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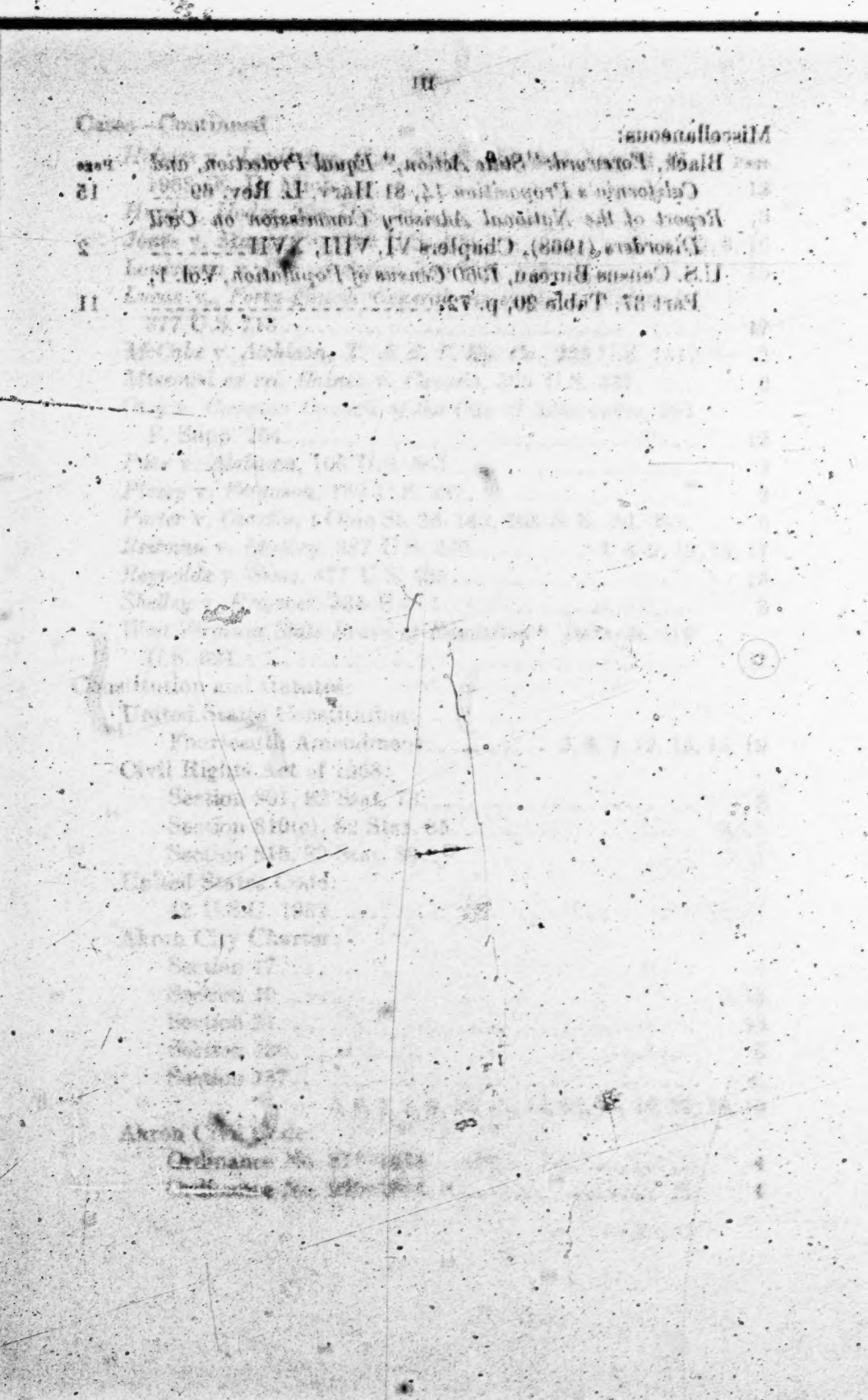

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 63

THE STATE OF OHIO, EX REL. NELLIE HUNTER ON BEHALF OF THE CITY OF AKRON, APPELLANT

v.

EDWARD O. ERICKSON, MAYOR OF THE CITY OF AKRON, ET AL.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the Supreme Court of Ohio is reported at 12 Ohio St. 2d 116, 233 N.E. 2d 129.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on December 27, 1967. A notice of appeal to this Court was filed on March 16, 1968. Probable jurisdiction was noted on June 3, 1968 (391 U.S. 963). The jurisdiction of this Court rests upon 28 U.S.C. 1257(2).

QUESTION PRESENTED

Whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, a municipal charter may provide that one class of ordinances—those dealing with racial or religious discrimination in the sale and rental of housing—is required to receive the approval of a majority of the voters before becoming effective.

INTEREST OF THE UNITED STATES

Section 801 of the Civil Rights Act of 1968, 82 Stat. 73, 81, declares: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." That policy, at least in its application to housing discrimination against Negroes, is not a new one. It has been federal law for more than a hundred years. 42 U.S.C. 1982; *Jones* v. *Mayer Co.*, 392 U.S. 409. Yet the consequences of decades of housing discrimination confront this nation with grave and pressing problems. See, *e.g.*, *Report of the National Advisory Commission on Civil Disorders*, Chs. VI, VIII, XVII (1968).[1]

[1] This Court has recognized the special force of claims relating to housing discrimination under the Equal Protection Clause. State-imposed residential segregation was held unconstitutional as early as 1917 (*Buchanan* v. *Warley*, 245 U.S. 60), at a time when present constitutional principles relating to enforced segregation in public and private schools (*Berea College* v. *Kentucky*, 211 U.S. 45; see *Gong Lum* v. *Rice*, 275 U.S. 78, 85-87; *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 344, 349), transportation (*Plessy* v. *Ferguson*, 163 U.S. 537; see *McCabe* v. *Atchison, T. & S.F. Ry. Co.*, 235 U.S. 151, 160), and other areas (*e.g.*, *Pace* v. *Alabama*, 106 U.S. 583)

Title VIII of the Civil Rights Act of 1968 contemplates that federal, state and local agencies will share the obligation of enforcing the right to nondiscriminatory treatment in obtaining housing (see Sections 810(c), 815, 82 Stat. 86, 89). Involved in the instant case is a municipality's effort to establish a uniquely burdensome procedure as a prerequisite for its participation in the national effort to eradicate discrimination in housing. Compliance with that procedure presents invidious difficulties, at best, and, at worst, is impossible. Thus, the constitutionality of the prescribed procedure is of concern to the United States. Resolution of the question presented is likely to affect significantly the future role of other states or municipalities in taking, or in failing to take, appropriate steps to provide enforcement machinery for the important federal right to fair housing.

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had not yet been established. In the restrictive covenant cases (*Shelley* v. *Kraemer*, 334 U.S. 1; *Hund* v. *Hodge*, 334 U.S. 24; *Barrows* v. *Jackson*, 346 U.S. 249), the Court found prohibited state action in the enforcement of private discriminatory agreements, while the requisite state involvement has not been found as readily in other matters (see, *e.g.*, *Bell* v. *Maryland*, 378 U.S. 226, 328-333 (Black, J. dissenting)). In *Shelley* v. *Kraemer*, 334 U.S. at 10, the Court observed:

> It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. * * *

STATEMENT

On July 14, 1964, the Council of the City of Akron enacted Ordinance No. 873-1964 (A. 5-13). This ordinance prohibited various forms of racial discrimination in the sale and rental of housing.[1] A Commission on Equal Opportunity in Housing, attached to the Mayor's office, was established by the ordinance to enforce its prohibitions.[2] Ordinance No. 926-1964, approved on July 22, 1964, amended the enforcement procedure prescribed by the earlier ordinance to give the Commission authority to issue orders which, if necessary, could be judicially enforced (A. 14-16).

On August 25, 1964, petitions were filed with the City's Clerk of Council to require that a proposed Section 137, to be added to the City Charter, be voted upon by the Akron electorate at the November 3,

[1] Explicit findings regarding the need for such legislation were recited by the City Council in the preamble to the ordinance. It was found, *inter alia*, that many Akron citizens "live in circumscribed and segregated areas, under sub-standard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing," and that "[t]hese conditions have caused increased mortality, disease, crime, vice and juvenile delinquency, fires and risk of fire, intergroup tensions and other evils, thereby resulting in great injury to the public safety, public health and general welfare of Akron" (A. 5). Nothing in the picture so painted by the City Council as existing in Akron can be viewed as atypical of conditions generally in our major urban areas.

[2] The Commission was empowered to conciliate complaints and, if conciliation failed, to "direct the Law Director of the City of Akron to commence an action in the Court of Common Pleas" (A. 10).

1964, general election (A. 24). Entitled "Regulation of Real Property Rights," the proposed Section 137 provided as follows (A. 27):

> Any ordinance enacted by the Council of the City of Akron which regulates the use, sale, advertisements, transfer, listing, assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.

The proposed Charter amendment was passed by a majority of the voters at the November election (A. 19).

2. On January 26 and 27, 1965, appellant, a Negro resident of Akron, filed complaints with the Mayor

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* Section 136 of the Akron City Charter provides that proposed charter amendments may be submitted to the electors of the City "by a vote of six members of the Council, and upon petitions signed by ten per centum of the electors of the City" (A. 38). Section 19 of the Charter also provides for referenda on any ordinance or resolution passed by the City Council, if a petition for a referendum signed by 10 percent of the electors is submitted "within thirty days after an ordinance or resolution shall have been passed by the Council" (A. 34). Section 11 of the charter, it should be noted, provides that an initiative petition proposing a new law, if it contains the signatures of not less than seven percent of the city's voters, must be submitted for approval or rejection in the manner prescribed for referenda.

and with the Commission on Equal Opportunity in Housing alleging that she encountered discrimination on account of race in efforts to secure housing (A. 24). The Commission refused to process appellant's complaint, and she instituted the present action by filing a petition for a writ of mandamus in the Ohio Court of Appeals for the Ninth Judicial District requesting that the Mayor and the Commission be required to perform their duties under the city ordinances (A. 17). The State Court of Appeals initially sustained appellees' demurrer and denied the writ on the authority of *Porter* v. *Oberlin*, 1 Ohio St. 2d 143, 205 N.E. 2d 368, a decision of the Supreme Court of Ohio invalidating a similar enforcement provision contained in another municipal fair housing ordinance. On appeal, the Ohio Supreme Court reversed, holding that *Porter* v. *Oberlin* was inapplicable to the facts here presented (6 Ohio St. 2d 130, 216 N.E. 2d 371).

On remand, the court of appeals held that the City Charter provision was lawfully adopted and that it repealed the earlier fair housing ordinances.[5] Con-

[5] Appellant had contended, *inter alia*, that Section 137 was invalid since it in effect constituted an attempt to conduct a belated referendum on the two ordinances without complying with the prescribed procedure therefor (see A. 19). Appellant also squarely attacked the Charter amendment on federal constitutional grounds, alleging that it was adopted "with the sole purpose, intent and effect of preserving and reinforcing racial segregation in housing," that it was the only Charter provision which purports to bar City Council from effectively legislating in an area which otherwise is a proper subject for local legislation, and that it conflicts with 42 U.S.C. 1982, thereafter construed and upheld by this Court in *Jones* v. *Mayer Co.*, 392 U.S. 409 (A. 20, 23).

cluding that Section 137 was not in conflict with any federal or state constitutional provisions, the court denied the requested writ (A. 38-46). On appeal, the Supreme Court of Ohio affirmed (A. 47-52). That court rejected appellant's reliance on this Court's decision in *Reitman* v. *Mulkey*, 387 U.S. 369, finding the provisions of the state constitutional amendment there involved and those of Section 137 distinguishable. That was so, the court stated, because "the legislative authority of Akron may still enact legislation denying or limiting the so-called right referred to in the California constitutional provision, and such legislation would become effective on approval thereof by the electors of Akron" (A. 50). Moreover, the court rejected appellants' argument that Section 137 was unconstitutional because it "require[d] prior voter approval only with respect to the kind of ordinances described" in the Charter amendment (A. 51). To that contention, the court responded that it was reasonable to classify ordinances of the kind covered by Section 137 separately, because the legislative body may choose "to proceed slowly in such an emotionally involved field as race relations" (*ibid.*).

ARGUMENT

INTRODUCTION AND SUMMARY

This case presents an apparently difficult question. That is so because, on the surface, Section 137 of the Akron City Charter does no more than repeal existing fair housing ordinances and return to the electors of the municipality the decision whether they wish to legislate on this subject. Arguably, that

is an acceptable democratic solution to a troublesome issue. Yet, realistically viewed, the result is that the City of Akron has encouraged racial discrimination and substantially prejudiced the prospects for remedial governmental action at the local level. The issue then is whether this consequence, offensive as it is to the national policy of non-discrimination in housing, embedded in federal law for a century and only recently reaffirmed, may nevertheless be condoned because it is accomplished by deferring decision to the rule of popular democracy. In the present context, we think not.

Our conclusion is premised on two somewhat overlapping considerations. We believe Section 137 violates the Equal Protection Clause, first (*infra*, pp. 9-12), because it gratuitously promotes, and thereby involves the municipality in, private discrimination on the basis of race with respect to housing. This, we suggest, results from the concurrence of several factors: Section 137 was enacted against the background of existing fair housing ordinances, which it annulled; it is more, however, than a simple repeal; it freezes into the law for a substantial period a license to discriminate on the ground of race, religion and ethnic origin; and, by singling out this conduct for special procedures, Section 137 seems to lend it a special official sanction. If we are correct in so appraising the purpose and effect of Section 137, then the case is controlled by *Reitman* v. *Mulkey*, 387 U.S. 369.

Second, we argue (*infra*, pp. 12-19) that Section 137 impermissibly discriminates against classes of

citizens by creating unique obstacles to the enactment of legislation for their benefit. This objection has special force here, we believe, because—unlike California's Proposition 14 involved in *Reitman*, where the Court did not reach this contention—Section 137 expressly singles out remedial laws prohibiting discrimination on account of race, religion, national origin or ancestry for special enactment procedures. In our view, it is no answer that the method employed is a resort to popular referendum, an otherwise unobjectionable legislative technique. Here the automatic referendum requirement amounts to a device to prejudice the victims of discrimination in securing governmental relief, particularly effective because they are minority groups whose voice is likely to be drowned out under the regime of unabated majority rule.

I. SECTION 137 OF THE AKRON CITY CHARTER VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT SIGNIFICANTLY INVOLVES THE CITY IN RACIAL, RELIGIOUS AND ETHNIC DISCRIMINATION WITH RESPECT TO HOUSING

Reitman v. *Mulkey*, 387 U.S. 369, affirmed a judgment striking down California's Proposition 14 because that provision was found to have "significantly involve[d]" the state in the invidiously discriminatory practices of private individuals as regards access to housing (*id.* at 376, 378, 380, 381). The same principle, we believe, condemns Section 137 of the Akron City Charter. Here, as there, governmental action—initiated by the electorate—repealed pre-existing fair housing legislation. Yet, in both instances, the method

used "struck more deeply and more widely" than "a mere repeal of existing statutes" (*id.* at 376-377). In Akron, as in California, there has been no simple return to the *status quo ante*: henceforth the right to discriminate on account of race or religion or national origin is immunized by the fundamental law of the jurisdiction against local remedy, unless the people themselves shall determine to provide relief.

The cases, we submit, are comparable. To be sure, there are factual differences. The Akron Charter provision does not expressly declare a "right" to discriminate. But that is only a matter of wording: here the legislative body is, in terms, disabled from enacting a fair housing law; in California, it was prohibited from "deny[ing], limit[ing] or abridg[ing] * * * the right" to discriminate by enacting such a law. The message conveyed is identical: "You are free to engage in discriminatory practices until and unless a majority of the voters of the jurisdiction—who have just solemnly declared themselves in favor of freedom to engage in those practices—decides otherwise." Indeed, in Akron, the meaning is clearer in that Section 137—unlike Proposition 14—is expressly confined to discriminations "on the basis of race, color, religion, national origin or ancestry."

Nor can it be dispositive—as the Ohio Supreme Court apparently believed (A. 50)—that the Akron City Council, unlike the California legislature, retains the power to propose a fair housing law. After the adoption of Section 137, one surely may discount the possibility that the council—whose recent decision has been overturned by the voters—will itself sponsor a referendum on a measure of this kind. The reality is

that, in Akron as in California, the future of fair housing legislation depends, in the first instance, on the initiative process.[5] The critical fact is that in both jurisdictions the enactment of remedial legislation ultimately requires a favorable vote of a majority of the electorate. And that appears no more attainable in Akron than in California, for here, too, the presumptive victims of housing discrimination are a relatively small minority.[6]

The upshot is that Section 137—just like Proposition 14 in California—tends to defeat any reasonable expectation that any fair housing law will be enacted in the near future.[7] To that extent, it ensures the continuation of a laissez-faire regime under which discriminatory practices are condoned,[8] and thus en-

[5] Procedures involving initiative and referendum existed in California to overturn Proposition 14. See the government's *amicus* brief in *Reitman*, No. 483, 1966 Term, pp. 28-30.

[6] As of 1960, of 180,455 voting-age residents of the city, only 19,950—about 11 percent—were non-white. U.S. Bureau of the Census, *1960 Census of Population*, Vol. I, Part 37, Table 20, p. 72.

[7] According to figures obtained from the Akron *Beacon-Journal*, the vote on the adoption of Section 137 was 62,302 for and 46,392 against. Assuming a substantial and near-unanimous Negro vote against Section 137, the white voters of Akron approved the charter amendment by close to a two-to-one margin.

[8] This is in addition to the element of substantial delay in obtaining fair housing legislation in Akron which, in all events, Section 137 necessarily produces. If an initiative measure to propose a fair housing ordinance is the course that is followed, this entails the painstaking task of obtaining the necessary number of proper signatures, before a referendum vote can be sought (see note 4, *supra*, and note 11, *infra*). And even if the City Council should enact a new law, the ordinance would necessarily be delayed in becoming effective during the time that the required referendum vote thereon is scheduled and conducted. In this regard, it should be noted that Section 137 specifically rules

encourages those who would engage in that discrimination. For this reason, we submit, Section 137 oversteps the line of neutrality and must fall under this Court's decision in *Reitman*.

II. SECTION 137 OF THE AKRON CITY CHARTER VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE, IN SINGLING OUT FAIR HOUSING LEGISLATION FOR SPECIAL AND BURDENSOME ENACTMENT PROCEDURES, IT DISCRIMINATES AGAINST CLASSES OF CITIZENS.

On its face, the challenged section of the Akron City Charter deals with one subject only—housing discrimination on account of race, religion or national origin. It does not—as did the provision involved in

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out the scheduling of a special election for such a referendum vote, since it in terms requires majority approval "at a regular or general election."

[9] Two district courts have followed this approach in striking down, even before approval by the electorate, "little Proposition 14's" in Milwaukee and Detroit. *Otey v. Common Council of the City of Milwaukee*, 281 F. Supp. 964 (E.D. Wisc.); *Hobson v. Ledbetter*, C.A. 31343, decided August 16, 1968 (E.D. Mich.).

A closely related, but somewhat different, issue is presented in *Holland v. Lucas County Board of Elections*, No. 77, this Term, which is presently pending on petition for certiorari. There the Toledo City Council enacted a fair housing ordinance which was submitted to referendum and defeated by a majority of the electorate. While in terms the referendum vote simply repealed the ordinance, the actual effect of that action, under the City Charter, is to prevent any such enactment in the future without affirmative vote thereon by a majority of the Toledo electorate. That charter provision, unlike Section 137 of the Akron charter, is a general one relating to all legislation, and is unaffected by referendum vote, but the practical effect of its operation is similar, in that it requires that fair housing laws can become effective in Toledo only after approval by a majority of the electorate. In this regard, it should be noted that Section 137 specifically rules

Reitman—purport to affect generally the right to transfer real property. In this particular, however, Section 137 is even more vulnerable than the California constitutional provision struck down in *Reitman*. The resulting prejudice to those classes of citizens who would benefit from fair housing legislation, we submit, violates the Equal Protection Clause.

Plainly, the purpose and effect of Section 137 is to remove from the ordinary lawmaking process a particular type of measure which would benefit Negroes and other minority groups. Before Section 137 was added to the City Charter, these minorities and other interested citizens could—as they did—persuade the elected representatives on the City Council to adopt a fair housing law. Such legislation would be vulnerable only if, within 30 days of its enactment, approximately 7,800 voters in Akron were to sign a referendum petition.[11] Only in those circumstances would a fair housing ordinance be put to a vote of the electorate.[12] Now, however, the burden has been

[11] Section 19 of the City Charter (A. 30–31) allows suspension of the operation of an ordinance if, within 30 days of its enactment, a referendum petition, signed by ten percent of the "electors of the City," is submitted to the Clerk of the Council. Under Section 21 of the Charter (A. 32–33), the required number of signatures is computed on the basis of the votes for the office of Mayor in the last preceding municipal election. According to the Summit County Board of Elections, 77,906 votes were cast in the November 1967 mayoralty election.

[12] In fact, in the instant case, the effort effectively to override the fair housing ordinances by proposing Section 137 as an initiative measure was not completed within the 30-day period which would have applied to obtain a referendum vote under Section 19 of the Akron Charter. That ground of challenge to Section 137 was, however, rejected by the lower courts on state law grounds (see A. 41–43).

shifted substantially. Those supporting fair housing legislation, unlike the proponents of any other municipal ordinance, must obtain not merely the approval of a majority of the City Council, but also the approval of a majority of the voters. Those opposing such a law have lifted from their shoulders the usual burden of obtaining the required number of signatures within the prescribed, short period of time to bring an enacted measure to a referendum vote. If proponents cannot succeed in having the City Council propose such a law in the face of a Charter provision like Section 137, their only recourse is to seek to follow the initiative route. Even if they succeed in convincing the Council members again to adopt a fair housing law, they—a distinct minority group—must wage a battle for majority support at the polls against substantial, indeed almost overwhelming, odds.

In short, whatever may be said about the tendency of Section 137 actively to encourage discriminatory housing practices, it is plain beyond debate that the challenged provision prejudices the victims of those practices by erecting a very real obstacle to the enactment of remedial legislation that would supplement the federal laws protecting them from such discrimination. Indeed, the Ohio Supreme Court expressly recognized as much when it characterized Section 137 as reflecting a decision "to proceed slowly in such an emotionally involved field as race relations" (A. 51). In other words, Section 137 is a deliberate brake on fair housing legislation.

It is difficult to appreciate how such a discrimination against the victims of bias and prejudice in hous-

ing can be squared with the mandate of the Fourteenth Amendment that no class of persons shall be denied "equal protection of the laws." See Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69.

The Equal Protection Clause prohibits a state or municipality from arbitrarily excluding voters from the booth (*e.g., Carrington v. Rash*, 380 U.S. 89; *Louisiana v. United States*, 380 U.S. 145; *Harper v. Virginia Board of Elections*, 383 U.S. 663), weighting their votes unequally (*Gray v. Sanders*, 372 U.S. 368), and giving greater representation to one class of voters than to another (*Reynolds v. Sims*, 377 U.S. 533; *Avery v. Midland County*, 390 U.S. 474). The same principles which forbid these and other forms of imbalance in the electoral processes apply, *a fortiori*, when what is at stake is the end product to which these are preliminary and preparatory stages, *i.e.*, the very enactment of legislation. It would obviously defeat the purpose of the voter equality guaranteed by *Reynolds* and *Avery*, and this Court's related decisions, if a state or local government, in fashioning procedures for the enactment of legislation, could build the inequalities prohibited at the voting or representational stages into the lawmaking process. Thus, just as a state may not weight its legislature to overrepresent rural interests, so also it may not provide, for example, that laws benefitting its cities shall become effective only if passed by three successive legislatures. And the constitutional inhibition against disenfranchising Negroes or the poor would forbid a state to prescribe, for instance, that laws

protecting the rights of racial minorities or laws designed to help the disadvantaged require a two-thirds vote in its legislature.

In light of these well-settled principles, it seems plain that Section 137 impermissibly discriminates against classes of citizens. It is wholly irrelevant that, in other neutral areas, more onerous procedures may properly be imposed for the enactment of particular measures. The court below to the contrary notwithstanding (A. 51), singling out for harsher treatment legislation that directly affects discrimination on account of race, religion or national origin is not a "reasonable classification." The Constitution itself forbids that inequality. Certainly, it cannot be condoned today when federal law expressly prohibits race and other invidious discrimination in housing. See Civil Rights Act of 1968, Title VIII, 82 Stat. 81; *Jones* v. *Mayer Co.*, 392 U.S. 409.[13]

[13] Contrary to the suggestion of appellees in their motion to dismiss, the enactment of Title VIII of the Civil Rights Act of 1968 has not rendered this case moot. The 1968 statute contemplates local enforcement in the manner prescribed by the now-repealed Akron fair housing ordinance. Indeed, Section 810(c) of the federal statute requires that deference be given to state or local enforcement "[w]herever a State or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies" to those provided in Title VIII. Moreover, Section 815 provides that nothing in the federal statute "shall be construed to invalidate or limit any law of a State or political subdivision of a State * * * that grants, guarantees, or protects the same rights as are granted" by Title VIII.

Nor does this Court's decision in *Jones* v. *Mayer Co.*, 392 U.S. 409, to the effect that 42 U.S.C. 1982, enacted in 1866, constitutionally reaches private discrimination in property

It remains only to consider whether Section 137, despite its discriminatory effect, is saved from constitutional challenge because it embodies a decision of the citizens of Akron as a whole to deal with the problem of housing discrimination in a "democratic" way. Certainly, popular initiative or ratification of an unconstitutional law does not immunize it. The most recent application of that obvious principle was in *Reitman* itself, involving an amendment to the California Constitution adopted by popular initiative. See, also, *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638; *Lucas* v. *Forty-fourth General Assembly of Colorado*, 377 U.S. 713, 736. But it might be said that there can be no objection to a measure which simply transfers legislative authority to the rule of popular democracy.

There is, of course, no constitutional inhibition, as such, on returning legislative power to the general electorate. On the other hand, the democratic principles embodied in our Constitution certainly do not prompt such a solution. Indeed, if one were to derive a guiding rule in our institutional history, it would seem to be that free recourse to the political process ought to be afforded by all existing avenues, includ-

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transactions, moot the instant appeal. As the Court there noted, "Whatever else it may be, 42 U.S.C. § 1982 is not a comprehensive open housing law." While enforcement by injunctive suit or criminal action is available under other federal statutes, Section 1982 itself contains no detailed remedial framework. Thus, even more than the 1965 statute, it can properly be viewed as contemplating state and local supplementation and enforcement. Thus, there is no basis for a claim of federal pre-emption here as to either statute.

ing initiative, referendum and a representative legislature. Thus, since Akron like most municipalities allows its electorate to be heard directly through initiative and referendum, the net effect of Section 137, in eliminating one method of enacting legislation, is to restrict, or clog, the lawmaking process, rather than open it up. One traditional path is now closed and the hands of the people's representatives are tied should they wish to act progressively in the interest of the community as a whole.

Nonetheless, the manner in which legislative power is exercised is a question which the Constitution normally leaves to local option. But it does not follow that a referendum requirement never oversteps constitutional boundaries. The controlling rule, we submit, is that announced by this Court in *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347, answering the claim that there could be no constitutional issue with respect to a mere change in municipal boundaries:

> When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. . . .

So, here, it does not matter that the means employed to discourage or delay the enactment of legislation to secure the rights of minorities was an automatic referendum requirement. That superficially innocuous method is invidious because the victims of housing discrimination, the most interested proponents of remedial laws, are relatively small minorities.

Whatever the result if Akron had decided to submit all decisions to the people—an obviously impractical solution for an urban center today—that is not what happened here. Cf. *Anderson v. Martin*, 375 U.S. 399.[14] Special procedures were devised for legislation barring racial, religious and ethnic discrimination with respect to housing—and nothing else. To paraphrase *Gomillion* (364 U.S. at 347), the municipality did not determine to essay participatory democracy "with incidental inconvenience" to Negroes and other victims of housing discrimination; rather, the design was to create a special barrier to the enactment of fair housing legislation, by resort to a mechanism which incidentally included the entire electorate in the legislative process. Accordingly, Section 137 must fall.

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[14] There a state law which required the designation of each candidate's race on the ballots used by voters was found to violate the Fourteenth Amendment. It was argued that the requirement reasonably served to inform the electorate about the candidates, and was non-discriminatory because it applied equally to Negro and white candidates. Rejecting those arguments, the Court concluded that the statute unconstitutionally placed the power of the state behind a racial classification that served to induce racial prejudice at the polls (*id.* at 402). There the statute was held invalid because it directed "the citizen's attention to the single consideration of race or color" (*ibid.*); here, by singling out fair housing laws for special procedural treatment, Akron has taken a similar, and similarly proscribed, step. Cf. *Gaus v. Board of Education*, 373 U.S. 683, 688.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted.

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